PHUNG HOE SENG @ PHANG HOE SENG

v.

UNITED MALAYAN BANKING CORPORATION BERHAD

COURT OF APPEAL, KUALA LUMPUR
DATO' MAHADEV SHANKAR JCA
DATO' V.C. GEORGE JCA
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J
[CIVIL APPEAL NO. B-08-302-1995]
31 JULY 1995

PRACTICE & PROCEDURE: *Application for leave to appeal - Filing - Whether to be filed in proper Registry - Application for leave of Court of Appeal filed in the High Court Registry - Whether misconceived - Whether liable to be dismissed - Rules of the Court of Appeal 1994, rr. 2, 27(1) - Effect of.*

PRACTICE & PROCEDURE: *Leave to appeal to Court of Appeal - Whether leave necessary when value of claim less than RM250,000 - Foreclosure action - Determination of value of claim - Whether value of claim was the amount due on the date the sale order was sought - Courts of Judicature Act 1964, s. 68(1)(a).*

WORDS & PHRASES: *"exclusive of interest" - Section 68(1)(a) Courts of Judicature Act 1964 - Whether referring to interest awarded by the Court upon pronouncing the final order.*

The applicant (the chargor) had created two charges in favour of the respondent bank to secure a loan of RM150,000 and an overdraft of RM100,000 respectively. Pursuant to the chargor's failure to comply with the requisite default notice, the bank on 19 July 1993 commenced foreclosure action to recover the loan, which, at the time, stood at RM527,632.70 inclusive of interest.

On 15 November 1994 a sale order of the charged land was granted by the High Court. The chargor intended to appeal against the Judge's order and filed a motion to that effect. This motion, however, was filed in the High Court Registry at Shah Alam and not, as it should have been, in the Court of Appeal Registry at Kuala Lumpur. The error notwithstanding the Registrar at Shah Alam signed the motion and consequently fixed a date for its disposal.

On 1 March 1995, the chargor, having apparently realised the filing error, filed an application in the Court of Appeal Registry, Kuala Lumpur, and prayed for an order that the motion filed in Shah Alam be deemed duly filed and proceeded with. On 24 April 1994 this motion was dismissed by the Court of Appeal. Dissatisfied, the chargor filed another application in the Court of Appeal, applying yet again for leave to appeal. The chargor argued that at the material time the principal amount outstanding "exclusive of interest" was only RM208,611.24, and that being the case, leave to appeal was required by virtue of s. 68(1)(a) of the Courts of Judicature Act 1964. The issues that arose were:

1. Whether it was proper of the chargor, after the dismissal of his earlier application for leave to appeal, to have made a second application for such leave.

2. Whether having regard to the amount actually outstanding in the claim, and s. 68(1)(a) aforesaid, the chargor did require leave to appeal against the said trial Judge's order.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] The chargor's application in the High Court at Shah Alam was misconceived. The effect of r. 27 of the Rules of the Court of Appeal 1994 read with the definition of "Court" in Rule 2 makes it imperative for all applications to the Court of Appeal to be filed in its Registry in Kuala Lumpur. Therefore the Registrar at Shah Alam was in error in signing the motion and fixing it for disposal.

[2] The claim by the chargor that the principal amount outstanding exclusive of interest is RM208,611.24 was also misconceived. This was a foreclosure action and the value of the bank's claim was the total amount due on the date on which the sale order was sought and this was RM255,789.88 under the first charge and RM301,842.82 under the second charge.

[3] As the total amount of the claim was more than RM250,000, the chargor required no leave to appeal against the trial Judge's order. That being the case the chargor's second application of 1 March 1995 for the motion filed at Shah Alam to be proceeded with, was equally misconceived.

[4] The words "exclusive of interest" under s. 68(1)(a) of the Courts of Judicature Act 1964 must refer to the amount of interest which the Court awards upon its judgment on the date on which it pronounces its final order. It does not apply to interest which has accrued up to the date of the judgment because any other construction of these words would strain its purpose beyond permissible limits of construction.

Per curiam:

Even if this Court was wrong in dismissing the earlier application for leave on 24 April 1994, the chargor's remedy was surely to file an appeal to the Federal Court, and not to apply again for leave to appeal.

We have noticed an unhappy trend that some practitioners are a little too ready to attack their opponents with allegations of misleading the Court when a contrary submission is made. It is a serious matter for one practitioner to accuse another of wilfully misleading the Court. We deplore this tendency and feel obliged to give notice that if such accusations are made in future without good reasons to justify them, we should take it upon ourselves to initiate the necessary disciplinary action.

[Application dismissed]

[**Bahasa Malaysia** Translation of Headnotes]

AMALAN & PROSEDUR: *Permohonan untuk kebenaran untuk merayu - Pemfailan - Samada harus difailkan di Pejabat Pendaftaran yang wajar - Permohanan untuk kebenaran Mahkamah Rayuan telah difai1kan di Pejabat Pendaftaran Mahkamah Tinggi - Samada telah tersalah-arah - Samada boleh ditolak - Kaedah-kaedah Mahkamah Rayuan 1994, kk. 2, 27(1) - Kesan.*

AMALAN & PROSEDUR: *Kebenaran untuk merayu kepada Mahkamah Rayuan - Samada kebenaran perlu bilamana nilai tuntutan kurang daripada RM250,000 - Tindakan halang-tebus - Penentuan nilai tuntutan - Samada nilai tuntutan merupakan jumlah yang kena dibayar pada tarikh perintah jualan dipohon - Akta Mahkamah Kehakiman 1964, s. 68(1)(a).*

PERKATAAN & ISTILAH: *"exclusive of interest" (tidak termasuk faedah) - Seksyen 68(1)(a) Akta Mahkamah Kehakiman 1964 - Samada merujuk kepada faedah yang telah diawardkan oleh Mahkamah setelah mengumumkan perintah muktamad.*

Pemohon (penggadai) telah mewujudkan dua gadaian atas nama baik responden untuk menjamin pinjaman sebanyak RM150,000 dan satu kemudahan overderaf sebanyak RM100,000 masing-masing. Setelah kegagalan penggadai untuk mematuhi notis kemungkiran, bank tersebut pada 19 Julai 1993 telah memulakan tindakan halang-tebus untuk mendapatkan semula pinjaman tersebut, yang mana, pada waktu itu, berada pada had RM527,632.70 termasuk faedah.

Pada 15 November 1994, satu perintah jualan ke atas tanah yang tergadai itu telah diberikan o1eh Mahkamah Tinggi. Penggadai berniat untuk merayu terhadap perintah Tuan Hakim tersebut dan telah memfailkan usul mengenainya. Usul ini walaubagaimanapun, telah difailkan di Pejabat Pendaftaran Mahkamah Tinggi di Shah Alam dan bukannya, sebagaimana ianya sepatutnya difailkan, di Pejabat Pendaftaran Mahkamah Rayuan di Kuala Lumpur. Tanpa menghirauken kesilapan itu, Pendaftar di Shah Alam telah menandatangani usul tersebut dan berikutan itu telah menetapkan tarikh untuk pelupusannya.

Pada 1 Mac 1995, penggadai, setelah mengetahui kesilapan di atas, telah memfailkan satu permohonan di Pejabat Pendaftaran Mahkamah Rayuan Kuala Lumpur dan memohon untuk mendapatkan satu perintah supaya usul yang telah difailkan di Shah Alam itu dianggap sebagai telah difailkan dengan betulnya dan diteruskan. Pada 24 April 1994 usul ini telah ditolak oleh Mahkamah Rayuan. Merasa tidak puashati, penggadai telah memfailkan satu permohonan yang lain ke Mahkamah Rayuan, memohon sekali lagi bagi kebenaran untuk merayu. Penggadai berhujah bahawa pada waktu yang material itu, jumlah pokok yang masih belum jelas "exclusive of interest", (tidak termasuk faedah) adalah hanya RM208,611.24, dan oleh kerana itu, kebenaran untuk memohan diperlukan menurut s. 68(1)(a) Akta Mahkamah Kehakiman 1964. Isu yang berbangkit adalah:

1. Samada ianya wajar bagi penggadai, selepas penolakan permohonannya yang lebih awal bagi kebenaran untuk merayu, membuat permohonan kedua untuk kebenaran yang sedemikian.

2. Samada dalam menimbangkan jumlah yang sebenarnya masih belum jelas dalam tuntutan tersebut, dan s. 68(1)(a), penggadai sebenarnya memerlukan kebenaran untuk merayu terhadap perintah Hakim perbicaraan tersebut.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Permohonan penggadai dalam Mahkamah Tinggi di Shah Alam telah tersalah-arah. Kesan k. 27 Kaedah-kaedah Mahkamah Rayuan 1994 yang dibaca bersama tafsiran "Court" (Mahkamah) dalam k. 2 menjadikannya mustahak bagi kesemua permohonan kepada Mahkamah Rayuan difailkan di Pejabat Pendaftarannya di Kuala Lumpur. Dengan itu Pendaftar di Shah Alam telah melakukan kesilapan dalam menandatangani usul tersebut dan menetapkannya untuk pelupusan.

[2] Tuntutan oleh penggadai bahawa jumlah pokok yang masih belum jelas tidak termasuk faedah adalah RM208,611.24 adalah silap. Ini adalah tindakan halang-tebus dan nilai tuntutan bank adalah jumlah keseluruhan yang kena dibayar pada tarikh yang mana perintah jualan tersebut telah dipohon dan jumlah ini adalah RM255,789.88 di bawah gadaian pertama dan RM301,842.82 di bawah gadaian kedua.

[3] Oleh kerana jumlah keseluruhan tuntutan tersebut adalah lebih daripada RM250,000, penggadai tidak memerlukan kebenaran untuk merayu terhadap perintah Hakim perbicaraan. O1eh itu, permohonan kedua penggadai bertarikh 1 Mac 1995 bagi usul yang telah difailkan di Shah Alam untuk diteruskan adalah juga tersalah-arah.

[4] Perkataan-perkataan "exclusive of interest" (tidak tarmasuk faedah) di bawah s. 68(1)(a) Akta Mahkamah Kehakiman 1964 mestilah merujuk kepada jumlah faedah yang mana telah diawardkan o1eh Mahkamah ketika penghakimannya pada tarikh bilamana ianya mengumumkan perintah muktamadnya. lanya tidak terpakai kepada faedah yang telah terakru sehingga kepada tarikh penghakiman kerana mana-mana pentafsiran lain bagi perkataan-perkataan ini akan melanjutkan tujuannya melampaui had pentafsiran yang dibenarkan.

Per curiam:

Sekirapun Mahkamah ini silap dalam menolak permohonan yang awal untuk kebenaran pada 24 April 1994, remedi penggadai adalah semestinya untuk memfailkan satu rayuan kepada Mahkamah Persekutuan, dan bukannya untuk memohon sekali lagi bagi mendapatkan kebenaran untuk merayu.

Kami telah melihat suatu kecenderungan yang tidak sihat, bahawa terdapat sebilangan pengamal undang-undang yang sentiasa bersedia untuk menyerang pihak menentang dengan pengataan-pengataan bahawa mereka telah mengelirukan Mahkamah bilamana sesuatu penghujahan yang bertentangan dibuat. Ianya merupakan perkara yang serius bagi seorang pengamal undang-undang menuduh pengamal yang lain telah dengan sengaja mengelirukan Mahkamah. Kami menyesali kecenderungan ini dan rasa bertanggungjawab untuk memberitahu bahawa jika tuduhan-tuduhan sedemikian dibuat di masa-masa yang akan datang tanpa sebarang alasan yang kukuh, kami akan bertanggungjawab untuk memulakan tindakan tatatertib yang perlu.

[Permohonan ditolak]

Legislations referred to:
Courts of Judicature Act 1964, s. 68(l)(a)
Rules of the Court of Appeal 1994, r. 2 r. 27(l)
Rules of the High Court 1980, O. 83 r. 3(3)

For the applicant: Ram Singh a/l Kehar Singh; M/s. Dusing & Co
For the respondent: Mohd Ismail Shariff (K.Thavakumar with him); M/s. Mohamed Ismail & Co.

JUDGMENT

Mahadev Shankar JCA:

After we dismissed an earlier application for leave to appeal, the applicant filed this application. Instead of appealing for extension of time to file the notice of appeal, this second application is also for leave to appeal. We dismissed it but reserved our decision on the proper order for costs which we should make.

On 3 February 1982, the applicant (the chargor) charged his land (the said land) in Port Klang to the respondent (the bank) to secure the repayment of a capital sum of RM150,000 to be lent to a company called Syarikat Machinco (M) Sdn. Bhd. (Machinco). On the same day, the chargor created a second charge in favour of the bank over the said land to repay another loan also to Machinco of which the capital sum was RM100,000. The first debt for RM150,000 was by way of a fixed loan and the second was a secured overdraft and interest was also payable.

In February 1993, the bank's solicitors served the notice of default in Form 16D of the National Land Code. Upon the failure of the chargor to remedy his default, the bank's solicitors commenced a foreclosure action by way of an originating summons dated the 19 July 1993 in the High Court at Shah Alam. The affidavit in support sets out the statutory particulars under O. 83 r. 3(3) of the Rules of the High Court 1980. The principal amount under the first charge was stated to be RM150,000 and under the second charge RM100,000. The combined claim in respect of principal was therefore RM250,000. The previous amount of the repayments under the first charge was RM108,611.34.

However, with the interest accrued due as at 19 July 1993, the principal and interest under the first charge was RM225,789.88. The principal and interest under the second charge was RM301,842.82. The combined total amount of principal and interest under both charges was therefore RM527,632.70. Under the first and second charges the continuing daily interest was RM77.09 and RM90.97 respectively.

The chargor filed a contentious affidavit disputing the right of the bank to obtain relief and the matter came up before Y.A. Dato' James Foong J on 15 November 1994. He found the chargor's contention devoid of merit. He then made an order in terms of the bank's application and set the date for the sale of the land on 21 February 1995.

Order 68(l)(a) of the Courts of Judicature Act 1964 (the Act), *inter alia*, prohibits the bringing of an appeal:

> (a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal

It is to be noted that leave is only required where the amount or value of the subject-matter of the claim is less than RM250,000. In other words, if the amount or value of the subject-matter of the claim is RM250,000 or more, no leave of the Court of Appeal is required.

Even if we assume that the value of the subject-matter of this claim (exclusive of interest) is equivalent to the amount of the principal only under the first and second charges, the total amount of the claim was RM250,000 and therefore no leave of the Court of Appeal was required.

However, the chargor's solicitors took the view that leave was required and filed a motion headed "the Court of Appeal" but in the High Court at Shah Alam to be issued by the "Pendaftar, Mahkamah Rayuan Malaysia, Shah Alam".

The effect of r. 27(l) of the Rules of the Court of Appeal 1994 read with the definition of "Court" in r. 2 makes it imperative for all applications to the Court of Appeal to be filed in its Registry in Kuala Lumpur. Therefore the Registrar at Shah Alam quite erroneously signed the motion and fixed it for disposal on 24 March 1995.

On 11 February 1995 the chargor's solicitors served an unsealed copy of this motion on the bank's solicitors together with an affidavit in support.

On 16 February 1995 the Registry at Shah Alam informed the chargor's solicitors that this motion would be rejected.

The same day, the chargor's solicitors wrote to the Registrar requesting her not to reject the motion because they would be filing another motion in the Court of Appeal in Kuala Lumpur requesting for an order that this motion be deemed duly filed so as to enable the application to be proceeded with. A copy of this letter was not extended to the bank's solicitors, who were therefore left to assume that the application will be proceeded with on 24 March 1995.

On 1 March 1995 the chargor's solicitors filed another application at Kuala Lumpur. In this motion they prayed for an order that the earlier motion filed in Shah Alam on 12 December 1994 be deemed duly filed in the Registry of Court of Appeal in Kuala Lumpur and be proceeded with. This motion was fixed for disposal on 24 April 1995.

Meanwhile still not having been informed by the chargor's solicitors of these developments, the bank's solicitors appeared in the Court cf Appeal on 24 March 1995 only to be told that there was no such motion pending for disposal. The chargor's solicitors were not present. The bank's solicitors wrote a letter of protest to the chargor's solicitors but not only got no satisfaction but were sharply told that their complaints "were indigestible" (*sic*).

On 31 March 1995 the bank's solicitors were served with the second notice of motion filed by the chargor's solicitors in Kuala Lumpur. They again protested and said that they would take the necessary objection at the hearing in the Court of Appeal.

The matter then came up before us on 24 April 1995. We allowed a minor amendment to the motion in respect of a typographical error in the number, went on to hear arguments on the motion proper for leave and dismissed it with costs.

We did so because, in our view, no leave was required to appeal against the order made by the High Court in Shah Alam on 15 November 1994. The chargor's solicitors' application in the High Court at Shah Alam was misconceived for the reasons aforesaid. The second application in the Court of Appeal was also misconceived because no leave was required.

Not having filed the notice of appeal within the prescribed period, we indicated that the chargor's solicitors should make a formal application for extension of time to file the notice of appeal. Such an application requires a supporting affidavit setting out a reasonable excuse for the omission and also the merits of the appeal.

This they did not do. Instead on 18 May 1995 they filed the present application in this Court again asking for leave under s. 68(l)(a) of the Act and that if leave is granted, they were to be given 14 days to file the notice of appeal, and for costs and other relief. The affidavit in support of this application was affirmed by Mr. Ram Singh of Counsel who appears to have conduct of this matter on behalf of the chargor. After setting out the factual history of his misadventures commencing from the filing of the application for leave in the wrong Court and ending with its dismissal on 24 April 1995, he proceeded to make serious allegations against the bank's solicitors who had the conduct of this matter i.e. Mr. Thavakumar. Firstly, he alleged that Mr. Thavakumar's letter dated 24 March 1995 complaining of his abortive attendance in the Court of Appeal on 24 March 1995, and his further letter of 31 March 1995 requesting clarification of the second motion filed by the chargor's solicitors, were both written with the sole intention of misleading this Court.

Then Mr. Ram Singh alleged that Mr. Thavakumar had further misled this Court on 24 April 1995 by representing that the principal sum payable is RM250,000 and therefore no leave was required. He claimed that this constituted grave misconduct and should be viewed seriously and he contended that the actual principal amount outstanding "exclusive of interest" is RM208,611.24.

Mr. Thavakumar filed an affidavit in response denying the charges of misleading the Court and set out what happened in Court on 24 April 1995.

It became quite obvious in the course of argument how Mr. Ram Singh had obtained the figure of RM208,611.24. He had merely added the total amount of the repayments of RM108,611.24 to the principal amount of RM100,000 due under the second charge.

What concerns us is that he did not care to justify this method of calculation. This was a foreclosure action and the value of the bank's claim was the total amount due on the date on which the sale order was sought and this was RM255,789.88 under the first charge and RM301,842.82 under the second charge.

Here we must explain that the words "exclusive of interest" under s. 68(l)(a) of the Act must, in our view, refer to the amount of the interest which the Court awards upon its judgment on the date on which it pronounces its final order. In our opinion, it does not apply to interest which has accrued up to the date of the judgment because any other construction of these words would be to strain its purpose beyond permissible limits of construction. In any event, if we had made a wrong decision in dismissing the earlier application for leave on 24 April 1995, the chargor's solicitors remedy was surely to file an appeal to the Federal Court, and not to apply again for leave to appeal.

Turning now to Mr Ram Singh's allegations of serious misconduct against the bank's solicitors, we would categorically state that we cannot find any evidence whatsoever of any intention on the part of the bank's solicitors to mislead this Court nor was the Court misled. The bank's solicitors' acts were all done in the proper performance of their duty to this Court and we are of the unanimous opinion that they should be vindicated. In the course of the proceedings before us, we repeatedly provided opportunities to Mr. Ram Singh to withdraw his allegations when it should have been obvious even to him that he was sadly mistaken. He refused.

We have noticed an unhappy trend that some practitioners are a little too ready to attack their opponents with allegations of misleading the Court when a contrary submission is made by way of a different interpretation of the same facts. It is a serious matter for one practitioner to accuse another of wilfully misleading the Court. We deplore this tendency and feel obliged to give notice that if such accusations are made in future without good reasons to justify them, we should take it upon ourselves to initiate the necessary disciplinary action.

In the present case, we hope that the chargor's solicitors will take cognizance of the remarks that we have made and that this aspect of the problem may yet be resolved by the lawyers concerned inter partes failing which the bank's solicitors have their remedies. As far as the present application is concerned, we think that the ends of justice be served by an order which we now make that the costs of this application be taxed on a solicitor and client basis and be paid by the chargor to the bank.